

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. **H205900**

JASON L. MARSHALL, Employee

CLAIMANT

TYSON POULTRY INC., Self-Insured Employer

RESPONDENT

OPINION FILED **NOVEMBER 30, 2023**

Hearing before ADMINISTRATIVE LAW JUDGE JOSEPH C. SELF in Springdale, Washington County, Arkansas.

Claimant represented by B. TANNER THOMAS, Attorney, Little Rock, Arkansas.

Respondents represented by JEREMY SWEARINGEN, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On November 16, 2023, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on August 31, 2023, and a pre-hearing order was filed on that same date. A copy of the pre-hearing order has been marked as Commission's Exhibit #1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The employee/employer/carrier relationship existed on May 16, 2022.
3. Claimant sustained a compensable injury on May 16, 2022.
4. The compensation rates are the maximum.

At the pre-hearing conference the parties agreed to litigate the following issues:

1. Whether claimant is entitled to temporary total disability benefits.
2. Whether claimant is entitled to medical benefits.

Marshall-H205900

3. Attorney fees.

All other issues are reserved by the parties.

However, at the hearing, claimant announced that he was reserving his claim for temporary total disability benefits. As a result, there was also no claim for attorney's fees being pursued at the hearing.

The claimant contends that "On 5/16/2022 he was using damaged equipment and he had to crank hard at a lever to open a feed bin on his truck. He heard his right shoulder pop, and the pain was immediate and worsened throughout the day. Claimant was diagnosed with a right shoulder labral tear after an arthroscopy and debridement. Claimant had continuing problems with his right shoulder and had to take off work again. Claimant was released and filed a COP with Dr. Cox, but this was not in respondents' network. Because of this, claimant has treated with Dr. Cox on his own. Claimant is now scheduled for another surgery. Claimant contends that he is entitled to additional treatment and that his attorney is entitled to an attorney's fee. All other issues are reserved."

The respondents contend that "They are not responsible for medical expenses which the claimant incurred on his own outside the authorized chain of referrals. The claimant had requested a change of physicians to Dr. Cox but then abandoned efforts to pursue a change to another doctor when Dr. Cox could not receive the change request. The claimant then admittedly sought unauthorized treatment with Dr. Cox. The claimant has requested attorney's fees on medical benefits, which are not permitted at law. Respondent reserves the right to supplement or amend these stipulations at a later date."

From a review of the entire record, including medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witness and to observe his demeanor, the following findings of fact and conclusions of law are made in

Marshall-H205900

accordance with A.C.A. §11-9-704:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at a pre-hearing conference conducted on August 31, 2023, and contained in a pre-hearing order filed that same date are hereby accepted as fact.

2. Claimant failed to prove that his treatment by Dr. Wesley Cox was authorized, nor was it emergency treatment, and therefore, the expenses of such are not the responsibility of respondent.

FACTUAL BACKGROUND

After discussing the matter with the attorneys before testimony began, it was made clear that the only issue for me to decide was whether claimant's treatment by Dr. Cox was authorized. As such, the summary of the hearing testimony and the exhibits will focus on the evidence that pertains to that single issue.

Mr. Tanner Thomas represented claimant at this hearing; during the discussions about the change of physicians, Ms. Laura Beth York was his attorney.

HEARING TESTIMONY

Claimant was the only witness to testify. He related how he hurt his right shoulder in June 2022 and explained that he underwent an arthroscopic labral repair in August 2022 performed by his authorized treating physician, Jason Stewart. Despite reporting to Dr. Stewart that he was still having problems with his shoulder and that it was more painful after the surgery than it was before, Dr. Stewart released claimant to return to work at full duty with no restrictions on December 9, 2022.

Claimant requested a change of physicians, but due to some issues beyond his control, no such change of physicians was authorized. In May 2023 claimant started seeing Dr. Wesley Cox, who began with conservative treatment including an injection into his right shoulder. That injection provided

Marshall-H205900

some relief for a short period of time but as of the date of the hearing, claimant believed that he needed additional arthroscopic surgery on his shoulder.

REVIEW OF THE EXHIBITS

Claimant provided the medical records from Drs. Stewart and Cox, both of which coincided with his testimony. There was an MRI performed on February 21, 2023, which was ordered by Dr. Thomas Knox and shows Dr. Donald Franklin as the admitting physician for that examination. The final record was from Dr. Cox on July 25, 2023, in which the doctor had scheduled claimant for shoulder surgery on August 21, 2023. Claimant had not had that surgery as of the date of the hearing, as he wanted to be sure that the expense of that procedure would be covered as part of his workers' compensation claim.

REVIEW OF NON-MEDICAL EXHIBITS

While neither party submitted the letter or e-mail that requested a change of physicians, it was common ground between the parties at the hearing that such had occurred sometime before January 9, 2023 as that was the earliest date in a series of e-mails between claimant's attorney, respondent's attorney, and Ms. Susan Isaac at the Workers' Compensation Commission Medical Cost Containment Division.

ADJUDICATION

The employer has the right to select the initial treating physician. Ark. Code Ann. § 11-9-514(a)(3)(A)(i). However, an employee may request a one-time change of physician. Ark. Code Ann. § 11-9-514(a)(2)(A). When a claimant seeks a change of physician, he must petition the Commission for approval. *Stephenson v. Tyson Foods, Inc.*, 70 Ark. App. 265, 270, 19 S.W.3d 36, 39 (2000). Treatment or services furnished or prescribed by any physician other than the ones selected according to the

Marshall-H205900

change-of physician rules, except emergency treatment, shall be at the claimant's expense. Ark. Code Ann. § 11-9-514(b).

Under Ark. Code Ann. § 11-9-514(b)-(c):

(b) Treatment or services furnished or prescribed by any physician other than the ones selected according to the foregoing [the choice and change-of-physician rules in Subsection (a)], except emergency treatment, shall be at the claimant's expense.

(c)(1) After being notified of an injury, the employer or insurance carrier shall deliver to the employee, in person or by certified or registered mail, return receipt requested, a copy of a notice, approved or prescribed by the commission, which explains the employee's rights and responsibilities concerning change of physician.

(2) If, after notice of injury, the employee is not furnished a copy of the notice, the change of physician rules do not apply.

(3) Any unauthorized medical expense incurred after the employee has received a copy of the notice shall not be the responsibility of the employer.

Respondent introduced the Employee's Notice of Injury form (AR-N) as well as the Acknowledgement of Managed Care Notice (R. X. 1-3), satisfying the requirement that claimant was furnished a copy of the rules regarding changing his treating physician. Neither party introduced claimant's petition to the Commission for approval to change physicians, but both parties referred to that request in the contentions in the prehearing order, and the exhibits that were submitted discussed it. I accept that a request was made. However, I was not provided with any proof that the change of physicians was approved by the Commission.

A chronological review of the emails that were submitted will show what happened--and what did not happen. For ease of reading, claimant's attorney in this exchange is Ms. Laura Beth York and her case manager is Amanda Faulkner (collectively referred to as "York"), respondent's counsel is Jeremy Swearingen, ("Swearingen"), and the Commission's Medical Cost Containment representative

Marshall-H205900

is Susan Isaac (“Isaac”):

1. 1/9/23: Swearingen advised York that the adjuster was getting claimant’s appointment with Dr. Knox set up. Reference is made to it being “his initial COP” (“change of physicians”) and scheduling an arthrogram before that appointment.
2. 1/17/23: York asked Swearingen about the status of the arthrogram; Swearingen replied the same day that the adjuster had authorized it and was trying to schedule it.
3. 1/18/23: Isaac emailed York, copy to Swearingen, advising that Dr. Franklin, who practices with Dr. Knox, was not in the MCO (Managed Care Organization) for this claim. Isaac asked, “Is there another physician you would like to use for the COP?”
4. 1/23/23: Swearingen asked Isaac if she had heard anything regarding her 1/18/23 email. Isaac replied that she had not. York was copied on both.
5. 1/24/23: York responded that anyone at Knox Ortho would be suitable. Isaac replied that all the other providers at Knox Ortho were in the MCO.
6. 1/25/23 Isaac said she sent the records to Dr. Franklin because he specialized in shoulders. Swearingen asked York if there was another doctor at the clinic that she wanted for the change of physicians.
7. 1/30/23 Isaac told York and Swearingen that Dr. Franklin was the only doctor at Knox that would accept claimant as a patient, but since he was not in the MCO, Isaac could not approve the COP to him. “Ms. York, you will need to choose another physician for the COP.” York asked about the arthrogram, Swearingen said it was approved because Dr. Franklin required it before seeing claimant, but it wasn’t scheduled because Dr. Franklin wasn’t appointed to assume claimant’s care. York said claimant had been notified of an appointment for an MRI, and asked if he should keep that appointment.
8. 2/8/23 Isaac asked York if she had picked another physician for the COP. York responded that she had been very ill and would get back with Isaac when she returned.
9. 2/16/23 Isaac to York, “Just following up on this one.” York to Isaac “Return to General Files, please.”

The parties are to be commended at how much communication and cooperation they showed through this email exchange. However, it does not appear in this record that a change of physicians was authorized by Ms. Isaac; she asked Ms. York about choosing a doctor that was in the MCO, because she could not name Dr. Franklin as claimant’s new physician, and no one else at Knox Ortho

Marshall-H205900

would accept him as a patient. Without an order authorizing a change of physicians, respondent is not responsible for the medical expenses related to the treatment by Dr. Cox. As respondent conceded at the hearing, claimant is still entitled to request such a change from the Commission's Medical Cost Containment Division and is encouraged to do so.

ORDER

Claimant's request for reimbursement for medical expenses incurred after February 21, 2023, and for continued treatment with Dr. Cox must be denied as it was unauthorized.

Respondent is responsible for paying the court reporter her charges for preparation of the hearing transcript in the amount of \$540.45.

IT IS SO ORDERED.

JOSEPH C. SELF
ADMINISTRATIVE LAW JUDGE